and the plaintiff before beginning suit sent a person to the defendant to investigate, and the latter repeated the slanders, the plaintiff could recover on the basis of the communication to his agent. For, as was pointed out by Lord Denman, it would be absurd to give the defendant extra rights when the plaintiff took a reasonable precaution. *Griffiths* v. *Lewis*, 7 Q. B. 61; 14 L. J. Q. B. 199. This, which is undoubtedly the present law, effectually does away with the "no publication" idea, as far, at least, as the authorities are concerned. *Duke of Brunswick* v. *Harmer*, 14 Q. B. 185; 19 L. J. Q. B. 20; *Gordon* v. *Spencer*, 2 Blackf. 286. Where the plaintiff was the first at fault, that is, where, as in the principal case, there had been no previous publication, the later decisions hold the occasion to be privileged. *Warr* v. *Jolly*, 6 Car. & P. 497; *Howland* v. *Blake Mfg. Co.*, 156 Mass. 543. On principle, this view seems scarcely more satisfactory than the older and discredited theory. Privilege to communicate imports the notion of a right like that of self-defence. Yet, in these cases, the defendant does not speak as of right; for if he knew of the circumstance which according to the courts gives him the privilege, namely, that his listeners are the plaintiff's agents, he would not speak at all.

Would it not be better for the law to admit the existence of the constituents necessary to make a technical libel, and deny the plaintiff relief on the ground that *volenti non fit injuria*?

Liability of a Lunatic for Negligence. — The case of *Williams* v. *Hays*, which has been appearing in various New York courts at irregular intervals during the last two years, and which probably has not even yet been finally decided, is remarkable for the human as well as legal interest that attaches to it. The facts of the case are refreshingly unusual. The defendant, who was one of several joint owners in a vessel, contracted with his co-owners to sail her under certain conditions, not necessary to be here detailed, but which, the court decided, made him not an agent but a charterer, or owner *pro hac vice*. On a voyage south the vessel met with severe storms, and her captain, the defendant, for more than two days was almost constantly on duty. Finally, becoming exhausted, he went to his cabin. The mate who had been left in charge, having found that the rudder was broken, went down for the captain and brought him on deck. The latter refused to recognize that the vessel was in danger, and declined the aid of two tug-boats, the masters of both of which offered to tow him to safety. In consequence, the vessel drifted on shore in broad daylight, and became a total wreck. The assignee of the rights of the company that insured the vessel brought suit. The defendant captain's sole defence was that from the time he entered his cabin till he found himself in the life-saving station he was totally unconscious and insane.

In November, 1894, the case came before the Court of Appeals squarely on the question: Is one, insane by act of God, liable for torts of negligence? By a bare majority, the court decided in the affirmative, but added: "If the defendant had become insane solely in consequence of his efforts to save the vessel during the storm, we would have had a different case to deal with. He was not responsible for the storm, and while it was raging his efforts to save the vessel were tireless and unceasing, and if he thus became mentally and physically incompetent to give

the vessel any further care, it might be claimed that his want of care ought not to be attributed to him *as a fault.* In reference to such a case, we do not now express any opinion." *Williams* v. *Hays*, 143 N. Y. 442. After a new trial, this reserved question came before the Supreme Court, which held that, applying the principle stated by the Court of Appeals, it could make no possible difference how the defendant became insane, or "what caused the disease or mental condition that prevented him from exercising the care or skill that he was bound to exercise." *Williams* v. *Hays*, 37 N. Y. Supp. 708.

The position of the Supreme Court is undoubtedly logical and necessary. If the general rule holds liable one rendered insane by act of God, it would require an unwholesome exercise of ingenuity to make an exception in favor of one rendered insane by extra and commendable effort. The proposition laid down by the Court of Appeals, on the other hand, seems hardly defensible. It is a subject on which there is a wide disagreement of the authorities (see 10 HARVARD LAW REVIEW, 65), and which therefore may well be settled in the pure light of reason. The Court of Appeals rested its decision on two grounds. First, that public policy required that a lunatic should be liable, which view appears to be largely fanciful; and second and chiefly, that "where one of two innocent persons must bear a loss, he must bear it whose act caused it." This last proposition clearly belongs to the doctrine of absolute liability, which was never to be defended with adequate reason, and which is now generally discredited. Even the Court of Appeals, in the principal case, while laying down a rule of absolute liability showed an unwillingness to stand squarely on such a doctrine by reserving opinion on a possible phase of the case before them. A theory, the advocates of which are forced to striking inconsistencies, does not commend itself to reason. The modern and enlightened view is thus stated by Beven, Vol. I. p. 52, 2d ed.: "Liability for trespass is not absolute and in any event, but dependent on the existence of fault." (Also *Brown* v. *Kendall*, 6 Cush. 292. Holmes on the Common Law, 77, *et seq.*) If blame or fault is indeed the basis of liability in tort, how can one blamelessly and totally insane be liable for the consequence of his negligence? To hold that he is, certainly is a step in the wrong direction.

RIGHT TO SUPPORT OF LAND. — A distinction of some delicacy, that might occasionally prove important to land-owners, is discussed in the case of *Cabot* v. *Kingman*, 44 N. E. Rep. 344 (Mass.). A city dug a ditch in a street to lay a sewer. Lying a little below the surface and extending under the abutting land were beds of fine sand, which were so full of water that as the latter flowed into the ditch it carried quantities of sand with it; and this sand was taken out by the pumps along with the water. The withdrawal of the sand caused the abutting land to subside; and the owners brought an action for the damage. The court allowed the plaintiff to recover, holding that he had a right to the support of the particles of soil which the defendant had removed, no matter how the latter had done so. A strong minority, however, held that the plaintiff could not complain of the withdrawal of the flowing quicksand. Now, not only is it settled that a man cannot complain of his neighbor for withdrawing percolating water from under his land (*Chasemore* v. *Richards*, 7 H. L. Cas. 349), but, what is more to the point, it has been held in